

1 THE HONORABLE JOHN C. COUGHENOUR
2
3
4
5
6
7
8

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 PUGET SOUNDKEEPER ALLIANCE, et al.,
10 Plaintiffs,

No. 2:20-CV-00950-JCC

11 v.
12 ANDREW WHEELER, et al.,
13 Defendants,
14 and
15 AMERICAN FOREST & PAPER
16 ASSOCIATION; AMERICAN PETROLEUM
17 INSTITUTE; EDISON ELECTRIC
INSTITUTE; NATIONAL MINING
ASSOCIATION, and the NATIONAL STONE,
SAND, & GRAVEL ASSOCIATION;
18 Intervenor-Defendants.

**INTERVENOR-DEFENDANTS'
ANSWER TO THE FIRST
AMENDED COMPLAINT**

INTRODUCTION

Pursuant to Fed. R. Civ. P. 8, Intervenor-Defendants American Forest & Paper Association; American Petroleum Institute; Edison Electric Institute; National Mining Association; and National Stone, Sand, and Gravel Association (collectively, the “Business Intervenors”), through the undersigned counsel, respectfully answer the Complaint (Dkt. 1) in the above-captioned action.

The headings and subheadings within the Complaint do not contain allegations that require a response. To the extent a response is required, the allegations contained in the headings and subheadings are denied.

1. Paragraph 1 consists of opinions, legal conclusions, and characterizations to which no response is required. Paragraph 1 also characterizes and selectively quotes from statutory authority, which is publicly available, speaks for itself, is the best evidence of its contents, and to which no response is required.

2. Paragraph 2 consists of opinions, legal conclusions, and characterizations to which no response is required. Paragraph 2 also characterizes statutory authority, which is publicly available, speaks for itself, is the best evidence of its contents, and to which no response is required.

3. Paragraph 3 characterizes plaintiffs' lawsuit and does not require a response. To the extent a response is required, the Business Intervenors admit that the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers (collectively, the "agencies") published a rule entitled "Definition of Waters of the U.S.: Recodification of Pre-Existing Rules" on October 22, 2012. *See* 84 Fed. Reg. 56,626 (October 22, 2019) ("Repeal Rule"). The Repeal Rule repealed prior definition of WOTUS. *See* "Clean Water Rule: Definition of 'Waters of the U.S.,'" 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 WOTUS Rule"). The Business Intervenors further admit that the agencies published "The Navigable Waters Protection Rule: Definition of 'Waters of the United States'" ("2020 Rule") on

1 April 21, 2020. See 85 Fed. Reg. 22,250 (Apr. 21, 2020). The 2020 Rule culminates a two-step
 2 process to repeal and then replace the 2015 Rule. The Business Intervenors further admit that
 3 coverage of the 2020 Rule challenged in this action is different than the prior regulatory regime,
 4 and that some wet areas covered by the prior regime would not be jurisdictional under the 2020
 5 Rule.

6 4. Paragraph 4 consists of opinions, legal conclusions, and characterizations to
 7 which no response is required. Paragraph 4 also characterizes statutory authority, which is
 8 publicly available, speaks for itself, is the best evidence of its contents, and to which no response
 9 is required. To the extent a response is required, the Business Intervenors deny the allegations in
 10 Paragraph 4.

11 5. Paragraph 5 consists of opinions, legal conclusions, and characterizations to
 12 which no response is required. To the extent a response is required, the allegations in Paragraph
 13 5 are denied.

14 6. Paragraph 6 constitutes plaintiffs' characterization of their claim for relief, to
 15 which no response is required.

16 7. The Business Intervenors lack information sufficient to form a belief as to the
 17 truth of the allegations in Paragraph 7.

18 8. The Business Intervenors lack information sufficient to form a belief as to the
 19 truth of the allegations in Paragraph 8.

20 9. The Business Intervenors lack information sufficient to form a belief as to the
 21 truth of the allegations in Paragraph 9.

22 10. The Business Intervenors lack information sufficient to form a belief as to the
 23 truth of the allegations in Paragraph 10.

24 11. Admitted.

25 12. Admitted.

1 13. Paragraph 13 consists of opinions, characterizations, and legal conclusions to
 2 which no response is required. To the extent a response is required, the Business Intervenors
 3 admit that coverage of the 2020 Rule challenged in this action is different than the prior
 4 regulatory regime, and that some wet areas covered by the prior regime would not be
 5 jurisdictional under the 2020 Rule. The Business Intervenors deny the remaining allegations in
 6 Paragraph 13.

7 14. Paragraph 14 consists of opinions, legal conclusions, and characterizations to
 8 which no response is required. To the extent a response is required, the Business Intervenors lack
 9 information sufficient to form a belief as to the truth of the allegations concerning the activities
 10 of the plaintiff organizations' members. The Business Intervenors deny the remaining allegations
 11 in Paragraph 14.

12 15. The Business Intervenors lack information sufficient to form a belief as to the
 13 truth of the allegations in Paragraph 15.

14 16. Paragraph 16 consists of legal conclusions to which no response is required.

15 17. Paragraph 17 consists of legal conclusions to which no response is required.

16 18. Paragraph 18 consists of legal conclusions to which no response is required. To
 17 the extent a response is required, the Business Intervenors lack information sufficient to form a
 18 belief as to the truth of the allegations in Paragraph 18.

19 19. Paragraph 19 consists of legal conclusions to which no response is required. To
 20 the extent a response is required, the Business Intervenors lack information sufficient to form a
 21 belief as to the truth of the allegations in Paragraph 19.

22 20. Paragraph 20 consists of opinions, legal conclusions, and characterizations to
 23 which no response is required. Paragraph 20 also characterizes and selectively quotes from
 24 statutory authority, which is publicly available, speaks for itself, is the best evidence of its
 25 contents, and to which no response is required.

26

1 21. Paragraph 21 consists of opinions, legal conclusions, and characterizations to
 2 which no response is required. Paragraph 21 characterizes and selectively quotes from statutory
 3 authority, which is publicly available, speaks for itself, is the best evidence of its contents, and to
 4 which no response is required.

5 22. Paragraph 22 consists of legal conclusions and characterizations to which no
 6 response is required. Paragraph 22 also characterizes and selectively quotes from statutory
 7 authority, which is publicly available, speaks for itself, is the best evidence of its contents, and to
 8 which no response is required.

9 23. Paragraph 23 consists of opinions and characterizations of legislative materials,
 10 which are publicly available, speak for themselves, are the best evidence of their contents, and to
 11 which no response is required.

12 24. Paragraph 24 consists of opinions to which no response is required. Paragraph 24
 13 also characterizes and selectively quotes from legislative materials, which are publicly available,
 14 speak for themselves, are the best evidence of their contents, and to which no response is
 15 required.

16 25. Paragraph 25 consists of opinions, legal conclusions, and characterizations to
 17 which no response is required. Paragraph 25 also characterizes and selectively quotes from
 18 legislative materials, which are publicly available, speak for themselves, are the best evidence of
 19 their contents, and to which no response is required.

20 26. Paragraph 26 consists of opinions, legal conclusions, and characterizations to
 21 which no response is required. Paragraph 26 also characterizes and selectively quotes from the
 22 *Federal Register*, which is publicly available, speaks for itself, is the best evidence of its
 23 contents, and to which no response is required.

24 27. Paragraph 27 consists of opinions, legal conclusions, and characterizations to
 25 which no response is required. Further, Paragraph 27 characterizes and selectively quotes from
 26

1 legal opinions, which are publicly available, speak for themselves, are the best evidence of their
2 contents, and to which no response is required.

3 28. Paragraph 28 consists of opinions, legal conclusions, and characterizations to
4 which no response is required. Paragraph 28 also characterizes legal opinions, which are publicly
5 available, speak for themselves, are the best evidence of their contents, and to which no response
6 is required.

7 29. Paragraph 29 consists of opinions and characterizations to which no response is
8 required. Paragraph 29 also characterizes and selectively quotes from a legal opinion, which is
9 publicly available, speaks for itself, is the best evidence of its contents, and to which no response
10 is required.

11 30. Paragraph 30 consists of opinions and characterizations to which no response is
12 required. Paragraph 30 also consists of opinions, characterizations, and legal conclusions to
13 which no response is required.

14 31. Paragraph 31 consists of a legal conclusion to which no response is required.

15 32. Paragraph 32 consists of legal conclusions and characterizations to which no
16 response is required. Paragraph 32 also characterizes and cites to statutory authority, which is
17 publicly available, speaks for itself, is the best evidence of its contents, and to which no response
18 is required.

19 33. Admitted.

20 34. Paragraph 34 consists of legal conclusions and characterizations to which no
21 response is required. Paragraph 34 characterizes and selectively quotes from the *Federal*
22 *Register*, which is publicly available, speaks for itself, is the best evidence of its contents, and to
23 which no response is required.

24 35. Paragraph 35 consists of opinions, legal conclusions, and characterizations to
25 which no response is required. Paragraph 35 also selectively quotes from the *Federal Register*
26

1 and characterizes agency materials, which are publicly available, speak for themselves, are the
 2 best evidence of their contents, and to which no response is required.

3 36. Paragraph 36 consists of opinions, legal conclusions, and characterizations to
 4 which no response is required. Paragraph 36 also characterizes agency materials, which are
 5 publicly available, speak for themselves, are the best evidence of their contents, and to which no
 6 response is required.

7 37. Paragraph 37 consists of opinions and characterizations to which no response is
 8 required. Paragraph 37 also characterizes agency materials, which are publicly available, speak
 9 for themselves, are the best evidence of their contents, and to which no response is required.

10 38. Paragraph 38 consists of opinions and characterizations to which no response is
 11 required. Paragraph 38 characterizes agency materials, which are publicly available, speak for
 12 themselves, are the best evidence of their contents, and to which no response is required.

13 39. Paragraph 39 consists of opinions and characterizations to which no response is
 14 required. Paragraph 39 also characterizes and selectively quotes from the *Federal Register*,
 15 which is publicly available, speaks for itself, is the best evidence of its contents, and to which no
 16 response is required.

17 40. The Business Intervenors admit the Agencies issued the 2015 Rule on June 29,
 18 2015. The remaining allegations in Paragraph 40 characterize and selectively quote from the
 19 *Federal Register*, which is publicly available, speaks for itself, is the best evidence of its
 20 contents, and to which no response is required.

21 41. Paragraph 41 consists of opinions and characterizations to which no response is
 22 required. Paragraph 41 also characterizes and selectively quotes from the *Federal Register*,
 23 which is publicly available, speaks for itself, is the best evidence of its contents, and to which no
 24 response is required.

25 42. Paragraph 42 consists of opinions and characterizations to which no response is
 26 required. In addition, Paragraph 42 characterizes and selectively quotes from agency materials,

1 which are publicly available, speak for themselves, are the best evidence of their contents, and to
 2 which no response is required.

3 43. Paragraph 43 consists of opinions and characterizations to which no response is
 4 required. Paragraph 43 also characterizes and selectively quotes from the *Federal Register*,
 5 which is publicly available, speaks for itself, is the best evidence of its contents, and to which no
 6 response is required.

7 44. Paragraph 44 consists of opinions and characterizations to which no response is
 8 required. Paragraph 44 also characterizes and selectively quotes from the *Federal Register* and
 9 agency materials, which are publicly available, speaks for themselves, are the best evidence of
 10 their contents, and to which no response is required.

11 45. Paragraph 45 consists of opinions and characterizations to which no response is
 12 required. Paragraph 45 also characterizes agency materials, which are publicly available, speak
 13 for themselves, are the best evidence of their contents, and to which no response is required.

14 46. Paragraph 46 consists of opinions and characterizations to which no response is
 15 required. Paragraph 46 also characterizes and selectively quotes from the *Federal Register*,
 16 which is publicly available, speaks for itself, is the best evidence of its contents, and to which no
 17 response is required.

18 47. Paragraph 47 consists of opinions and characterizations to which no response is
 19 required. Paragraph 47 also characterizes and selectively quotes from the *Federal Register*,
 20 which is publicly available, speaks for itself, is the best evidence of its contents, and to which no
 21 response is required.

22 48. Paragraph 48 consists of opinions, characterizations, and legal conclusions to
 23 which no response is required. Paragraph 48 also characterizes and selectively quotes from the
 24 *Federal Register*, which is publicly available, speaks for itself, is the best evidence of its
 25 contents, and to which no response is required. To the extent a response is required, the Business
 26 Intervenors deny that the exclusion for waste treatment systems create waste dumps in waters.

1 49. Paragraph 49 consists of opinions, characterizations, and legal conclusions to
 2 which no response is required. Further, Paragraph 49 characterizes and selectively quotes from
 3 the *Federal Register*, which is publicly available, speaks for itself, is the best evidence of its
 4 contents, and to which no response is required.

5 50. Paragraph 50 consists of opinions, characterizations, and legal conclusions to
 6 which no response is required. Further, Paragraph 50 characterizes and selectively quotes from
 7 the *Federal Register*, which is publicly available, speaks for itself, is the best evidence of its
 8 contents, and to which no response is required.

9 51. Paragraph 51 consists of opinions and characterizations. Paragraph 51 also
 10 characterizes and selectively quotes from the Federal Register, which is publicly available,
 11 speaks for itself, is the best evidence of its contents, and to which no response is required.

12 52. Paragraph 52 characterizes Executive Order No. 13778, which is publicly
 13 available, speaks for itself, is the best evidence of its contents, and to which no response is
 14 required. The allegations in Paragraph 52 also contain conclusions of law to which no response is
 15 required; to the extent these allegations are offered for the truth of the matters asserted, the
 16 allegations in Paragraph 52 are denied.

17 53. The Business Intervenors admit that the Agencies published the referenced notice
 18 of proposed rulemaking in 2017. The remaining allegations in Paragraph 53 characterize the
 19 Federal Register, which is publicly available, speaks for itself, is the best evidence of its
 20 contents, and to which no response is required.

21 54. The Business Intervenors admit that the Agencies published the 2019 Repeal Rule
 22 on October 22, 2019. The remaining allegations in Paragraph 54 characterize the *Federal*
 23 *Register*, which is publicly available, speaks for itself, is the best evidence of its contents, and to
 24 which no response is required.

25 55. Admitted.

26

1 56. Paragraph 56 consists of opinions, characterizations, and legal conclusions to
 2 which no response is required. Additionally, Paragraph 56 characterizes the *Federal Register*,
 3 which is publicly available, speaks for itself, is the best evidence of its contents, and to which no
 4 response is required. To the extent a response is required, the Business Intervenors deny the
 5 allegations in Paragraph 56.

6 57. Paragraph 57 consists of opinions and legal conclusions to which no response is
 7 required. Paragraph 57 also characterizes the *Federal Register*, which is publicly available,
 8 speaks for itself, is the best evidence of its contents, and to which no response is required. To the
 9 extent a response is required, the Business Intervenors deny the allegations in Paragraph 57.

10 58. Admitted.

11 59. Paragraph 59 consists of opinions to which no response is required. To the extent
 12 a response is required, the allegations in Paragraph 59 are denied.

13 60. Admitted.

14 61. Paragraph 61 consists of opinions, characterizations, and legal conclusions to
 15 which no response is required. Paragraph 61 also characterizes the *Federal Register*, which is
 16 publicly available, speaks for itself, is the best evidence of its contents, and to which no response
 17 is required. To the extent a response is required, the Business Intervenors admit that coverage of
 18 the 2020 Rule challenged in this litigation is different from the prior regulatory regime, and that
 19 some wet areas covered by the prior regime would not be jurisdictional under the 2020 Rule.

20 62. Paragraph 62 consists of characterizations, opinions, and legal conclusions, to
 21 which no response is required. Further, the allegations in Paragraph 62 characterize the *Federal*
22 Register, which is publicly available, speaks for itself, is the best evidence of its contents, and to
 23 which no response is required.

24 63. Paragraph 63 consists of opinions, characterizations, and legal conclusions to
 25 which no response is required. Further, the allegations in Paragraph 63 characterize the *Federal*

26

1 *Register*, which is publicly available, speaks for itself, is the best evidence of its contents, and to
 2 which no response is required.

3 64. Paragraph 64 consists of opinions and characterizations to which no response is
 4 required. Paragraph 64 also characterizes and selectively quotes from the *Federal Register*,
 5 which is publicly available, speaks for itself, is the best evidence of its contents, and to which no
 6 response is required.

7 65. Paragraph 65 consists of opinions, characterizations, and legal conclusions to
 8 which no response is required. Paragraph 65 also characterizes and selectively quotes from the
 9 *Federal Register*, which is publicly available, speaks for itself, is the best evidence of its
 10 contents, and to which no response is required. To the extent a response is required, the Business
 11 Intervenors admit that coverage of the 2020 Rule challenged in this litigation is different from
 12 the prior regulatory regime, and that some wet areas covered by the prior regime would not be
 13 jurisdictional under the 2020 Rule.

14 66. Paragraph 66 consists of opinions, characterizations, and legal conclusions to
 15 which no response is required. Paragraph 66 also characterizes and selectively quotes from the
 16 *Federal Register*, which is publicly available, speaks for itself, is the best evidence of its
 17 contents, and to which no response is required. To the extent a response is required, the Business
 18 Intervenors admit that coverage of the 2020 Rule challenged in this litigation is different from
 19 the prior regulatory regime, and that some wet areas covered by the prior regime would not be
 20 jurisdictional under the 2020 Rule.

21 67. Paragraph 67 consists of opinions, characterizations, and legal conclusions to
 22 which no response is required. Paragraph 67 characterizes and selectively quotes from the
 23 *Federal Register*, which is publicly available, speaks for itself, is the best evidence of its
 24 contents, and to which no response is required.

25 68. Paragraph 68 consists of opinions, characterizations, and legal conclusions to
 26 which no response is required. Paragraph 68 also characterizes and selectively quotes from the

1 *Federal Register*, which is publicly available, speaks for itself, is the best evidence of its
 2 contents, and to which no response is required.

3 69. The allegations in Paragraph 69 consists of opinions, characterizations, and legal
 4 conclusions to which no response is required. Further, Paragraph 69 characterizes and selectively
 5 quotes from the *Federal Register*, which is publicly available, speaks for itself, is the best
 6 evidence of its contents, and to which no response is required.

7 70. Paragraph 70 consists of opinions and legal conclusions to which no response is
 8 required. Further, the allegations in Paragraph 70 characterize a legal opinion and the *Federal*
 9 *Register*, which are publicly available, speak for themselves, are the best evidence of their
 10 contents, and to which no response is required.

11 71. Paragraph 71 consists of opinions, characterizations, and legal conclusions to
 12 which no response is required. Paragraph 71 also characterizes the *Federal Register*, which is
 13 publicly available, speaks for itself, is the best evidence of its contents, and to which no response
 14 is required. To the extent a response is required, the Business Intervenors deny the allegations in
 15 Paragraph 71.

16 72. Paragraph 72 consists of opinions, characterizations, and legal conclusions to
 17 which no response is required. To the extent a response is required, the Business Intervenors
 18 deny the allegations in Paragraph 72.

19 73. Paragraph 73 consists of opinions, characterizations, and legal conclusions to
 20 which no response is required. The allegations in Paragraph 73 also characterize the *Federal*
 21 *Register*, which is publicly available, speaks for itself, is the best evidence of its contents, and to
 22 which no response is required. To the extent a response is required, the Business Intervenors
 23 deny the allegations in Paragraph 73.

24 74. Paragraph 74 consists of opinions, characterizations, and legal conclusions to
 25 which no response is required. The allegations in Paragraph 74 also characterize the *Federal*
 26 *Register*, which is publicly available, speaks for itself, is the best evidence of its contents, and to

1 which no response is required. To the extent a response is required, the Business Intervenors
2 deny the allegations in Paragraph 74.

3 75. Paragraph 75 consists of opinions, characterizations, and legal conclusions to
4 which no response is required. The allegations in Paragraph 75 also characterize the *Federal*
5 *Register*, which is publicly available, speaks for itself, is the best evidence of its contents, and to
6 which no response is required. To the extent a response is required, the Business Intervenors
7 deny the allegations in Paragraph 75.

8 76. Admitted.

9 77. Paragraph 77 consists of opinions and characterizations to which no response is
10 required. Paragraph 77 also characterizes and selectively quotes from agency materials, which
11 are publicly available, speak for themselves, are the best evidence of their contents, and to which
12 no response is required.

13 78. Paragraph 78 consists of opinions and characterizations to which no response is
14 required. Paragraph 78 also characterizes and selectively quotes from agency materials, which
15 are publicly available, speak for themselves, are the best evidence of their contents, and to which
16 no response is required. To the extent a response is required, the allegations in Paragraph 78 are
17 denied.

18 79. Paragraph 79 consists of opinions and characterizations to which no response is
19 required. Paragraph 79 also characterizes and selectively quotes from agency materials, which
20 are publicly available, speak for themselves, are the best evidence of their contents, and to which
21 no response is required.

22 80. Paragraph 80 consists of opinions, characterizations, and legal conclusions to
23 which no response is required. Paragraph 80 also characterizes and selectively quotes from
24 agency materials, which are publicly available, speak for themselves, are the best evidence of
25 their contents, and to which no response is required.

26

81. Paragraph 81 consists of opinions, characterizations, and legal conclusions to which no response is required. To the extent a response is required, the Business Intervenors deny the allegations in Paragraph 81.

The allegations following Paragraph 81 are statements of legal theories, causes of action, and a prayer for relief, to which no response is required.

GENERAL DENIAL

To the extent that any factual allegation in the Complaint has not been admitted or specifically responded to, the Business Intervenors deny such allegation.

DEFENSES

1. The Court lacks jurisdiction over some or all of Plaintiffs' claims.
 2. Plaintiffs have failed to state a claim for which relief can be granted with respect to one or more of the claims set forth in the Complaint.
 3. Plaintiffs lack standing with respect to one or more of the claims set forth in the Complaint.

The Business Intervenors reserve the right to raise any defense, including but not limited to those found in Federal Rules of Civil Procedure 8(c) and 12, that may be supported by the record in this case.

Dated this 8th day of October, 2020.

TUPPER MACK WELLS PLLC

/s/ James A. Tupper, Jr.
James A. Tupper, Jr., WSBA No. 16873
2025 First Avenue, Suite 1100
Seattle, WA 98121
(206) 493-2300
tupper@tmw-law.com

/s/ Lynne M. Cohee
Lynne M. Cohee, WSBA No. 18496
2025 First Avenue, Suite 1100
Seattle, WA 98121
(206) 493-2300
cohee@tmw-law.com

1
2 MAYER BROWN LLP
3

4 Timothy S. Bishop*
5 Colleen M. Campbell*
6 1999 K Street NW
7 Washington, DC 20006
8 (202) 263-3000
9 tbishop@mayerbrown.com
ccampbell@mayerbrown.com

10 Brett E. Legner*
11 71 S. Wacker Drive
12 Chicago, IL 60606
13 Telephone: (312) 701 7829
14 Facsimile: (312) 706 8607
15 blegner@mayerbrown.com

16 *Attorneys for Intervenors-Defendants*
17 *Pro hac vice